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SAC, CALIFORNIA

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re:

Request for Regulatory)
Determination filed by)
the California Catholic)
Conference, regarding the)
Board of Equalization's)
policy, set forth in the)
Assessors' Handbook:)
"Welfare Exemption" AH)
267, which disallows the)
property tax welfare)
exemption for religious)
property used for)
residential purposes¹)

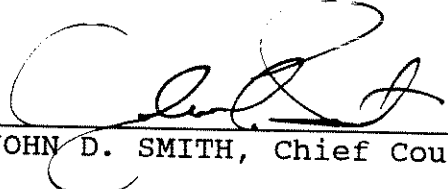
1990 OAL Determination No. 9

[Docket No. 89-015]

May 23, 1990

Determination Pursuant to
Government Code Section
11347.5; Title 1, California
Code of Regulations,
Chapter 1, Article 2

Determination by:


JOHN D. SMITH, Chief Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the Board of Equalization's policy, set forth in an Assessors' Handbook, which disallows the property tax welfare exemption for religious property used for residential purposes, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that this policy is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not the Board of Equalization's ("Board") policy, set forth in Assessors' Handbook AH 267, "Welfare Exemption," (December 1985) pages 32-33, which disallows the property tax welfare exemption for religious property used for residential purposes, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{4, 5, 6, 7, 8}

OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) this policy is not exempt from the requirements of the APA; and therefore,
- (4) the policy violates Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The State Board of Equalization ("Board") was created by former Article XIII, section 9 of the California Constitution of 1879. Language establishing the Board is currently found in California Constitution, Article XIII, section 17. The Board is charged with administering numerous tax programs, including the collection of property and sales tax, for the support of state and local governmental activities. The Board also has major responsibilities in providing rules and regulations governing Property Tax. As an appellate body, the Board hears appeals in a number of different areas, including Property Tax, Sales and Use Tax, Personal Income Tax, and Bank and Corporation Tax.

Authority ¹⁰

Government Code section 15606 grants to the Board authority to adopt rules and regulations governing Property Tax. Section 15606 provides:

"The State Board of Equalization shall do all of the following:

". . . .

"(c) Prescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing

"(d) Prescribe and enforce the use of all forms for the assessment of property for taxation, including forms to be used for the application for reduction in assessment.

"(e) Prepare and issue instructions to assessors designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation. . . .

"(f) Subdivisions (c), (d) and (e) shall include, but are not limited to, rules, regulations, instructions, and forms relating to classifications of kinds of property and evaluation procedures.

"(g) Prescribe rules and regulations to govern local boards of equalization when equalizing and assessors when assessing with respect to the assessment and equalization of possessory interests.

"(h)

"This section is mandatory." [Emphasis added.]

The final sentence of section 15606 makes clear that the section is mandatory; the Board thus must "prescribe rules and regulations to govern . . . assessors when assessing"

Background: Relevant Constitutional, Statutory and Judge-made Law

Article XIII of the California Constitution, section 1 states:

"Unless otherwise provided by this Constitution or the laws of the United States:

(a) All property is taxable"

In 1900, section 1 1/2 was added to Article XIII which provided that churches were exempt from property taxation.¹¹ In 1974, section 1 1/2 was repealed and reenacted as Article XIII, section 3.¹² Section 3 currently provides:

"The following are exempt from property taxation:

". . . .

"(f) Buildings, land on which they are situated, and equipment used exclusively for religious worship." [Emphasis added.]

In 1944, section 1c was added to Article XIII.¹³ Section 1c conferred upon the Legislature the authority to expand the list of properties constitutionally exempt from taxation. Section 1c was also repealed in 1974 and reenacted as Article XIII, section 4. Section 4 currently states:

"The Legislature may exempt from property taxation in whole or in part:

"(a)

"(b) Property used exclusively for religious, hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those

purposes, (2) that are nonprofit, and (3) no part of whose net earnings inures to the benefit of any private shareholder or individual. . . ."
[Emphasis added.]

This enabling provision of the Constitution confers upon the Legislature the power to grant exemptions to nonprofit organizations with respect to "property used exclusively for religious, hospital or charitable purposes." The provision is permissive, not mandatory. The Legislature may refrain from exempting, or exempt all or part of the property specified or impose additional conditions.

In 1945, pursuant to this authority, the Legislature enacted section 214 of the Revenue and Taxation Code, which states that "The exemption provided for herein shall be known as the 'welfare exemption.'"¹⁴ The enactment of section 214 was motivated by the proposition that the exemption would provide tax relief for private charities for performing functions otherwise paid for by the taxpayers.¹⁵ The proponents of the provision pointed out that "in spite of a loss of revenue from taxation, the savings to the taxpayers of providing these services would far exceed the entire exemption cost."¹⁶

Section 214 of the Revenue and Taxation Code provides in part:

"(a) Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

(1) The owner is not organized or operated for profit

(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual.

(3) The property is used for the actual operation of the exempt activity, and does not exceed an amount of property reasonably necessary to the accomplishment of the exempt purpose. . . ."
[Emphasis added.]

For purposes of this Determination, we will focus on the "property used exclusively for religious purposes" aspect of section 214.

Section 214, and in particular, the "property used exclusively for religious purposes" provision of section

214, was examined and interpreted in 1950 by the California Supreme Court in Serra Retreat v. County of Los Angeles.¹⁷ The issue presented in the Serra Retreat case was whether a portion of a retreat house, used as living quarters for priests and lay-brothers who attended to the spiritual and temporal needs of laypeople making the retreats, was entitled to the welfare tax exemption, under section 214, as "property used exclusively for religious . . . or charitable purposes." The Supreme Court stated:

"As discussed in the opinion this day filed in the six consolidated hospital cases, [citation], the rule of strict construction applies to the welfare exemption law [Revenue and Taxation Code section 214] and the institution seeking its benefit must clearly show that it comes within the terms thereof; but adherence to this rule does not require so rigid and narrow an interpretation of the exempting language as to defeat the apparent design of the lawmakers. In short, there must be a strict but reasonable construction of this law as applied to the particular facts at hand.

The Supreme Court then held:

"To this point it would appear that the exemption of property 'used exclusively for religious . . . or charitable purposes' should be held to include any property of the religious or charitable entity which is used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of religious or charitable purposes. The integrated activities as a whole must be examined in determining the tax status of property for the welfare exemption."¹⁸

In applying the "incidental to and reasonably necessary" test to the facts of the case, the Court found that

"the determinative factor here sustaining the propriety of the welfare tax exemption is the alleged institutional necessity for the provision of living quarters on the retreat property for the essential personnel. So significant are the allegations in the complaint that the 'presence on [plaintiff's] property of [the] priests and lay-brothers is essential, indispensable and necessary to the conduct and operation of [the] Serra Retreat,' and that their living on said property is 'essential and necessary' to the 'spiritual' and 'temporal needs,' respectively, of 'the laymen using the facilities of said institution.' [T]he conclusion is inescapable that the portion of plaintiff's building used to furnish housing accommodations for the essential retreat personnel is properly classifiable as property 'used exclusively for

religious purposes.' As so viewed, plaintiff's provision of living quarters for its needed retreat personnel as an institutional necessity--a facility incidental to and reasonably necessary for the accomplishment of its religious and charitable purposes--is wholly distinguishable from the parsonage cases where the provision of housing for the pastor or minister on church property does not stem from claims of institutional necessity as contrasted with mere considerations of residential convenience."¹⁹
[Emphasis added.]

In 1988, the Legislature amended section 214 by adding subdivision (i).²⁰ Subdivision (i) provides:

"(i) Property used exclusively for housing and related facilities for employees of religious, charitable, scientific, or hospital organizations which meet all the requirements of subdivision (a) and owned and operated by funds, foundations, or corporations which meet all the requirements of subdivision (a) shall be deemed to be within the exemption provided for in subdivision (b) of Sections 4 and 5 of Article XIII of the California Constitution and this section [214] to the extent the residential use of the property is institutionally necessary for the operation of the organization." [Emphasis added.]²¹

We note that this amendment of section 214 was cited by neither the Requester in its Request nor by the Board in its Response, and is not mentioned in the challenged Assessors' Handbook, "Welfare Exemption." The "FORWARD" of the Handbook states:

"Legislation affecting matters in this welfare handbook enacted after September 1, 1985 will be sent to users of this handbook in the form of letters to assessors. Subsequent updated pages will be sent on an annual basis."

In its Response, the Board did not indicate whether a letter to assessors or updated handbook pages, regarding the addition of subdivision (i) to section 214, were ever sent.

Background: This Determination

On August 23, 1989, Raymond J. Leonardini submitted to OAL a Request for Determination on behalf of the California Catholic Conference (the "Requester"), an association of the Roman Catholic bishops in California.

The Request for Determination challenges the Board's policy regarding property tax welfare exemptions for the residential use of religious property, set forth in the

Board's Assessors' Handbook: "Welfare Exemption" AH 267 (December 1985), pages 32-33. The Requester alleges that the Board is "formulating a general policy regarding property tax exemptions for residences owned and operated by religious institutions," and that this "general policy is promulgated and published to county assessors through the Assessors' Handbook in order to influence the future decisions of county assessors." The challenged Board policy, beginning on page 32 of the Handbook, states:

"Similarly, in Serra Retreat v. County of Los Angeles, [citation], the court held that the integrated activities of the organization as a whole must be examined, and where, in conducting a religious retreat, it was an institutional necessity that quarters be provided for the priests and lay brothers of the retreat, such quarters are exempt. At the same time, the court recognized that parish houses and rectories probably should be denied the exemption 'where the provision of housing for the pastor or minister on church property does not stem from claims of institutional necessity as contrasted with mere considerations of residential convenience.' [Footnote omitted.]

"Housing owned by a church and occupied by members of the church is not exempt when the members otherwise live conventional nonreligious lives, e.g., full-time students having outside employment. Similarly, conventional residences of ministers, priests, and rabbis have never been exempted because they are used for their private residential purposes and not religious purposes exclusively. On the other hand, if the practitioners of a religion seek to follow it in a contemplative manner and in order to do so live withdrawn from the world within the confines of a monastery or convent in a full-time commitment [sic] of their lives to religious practices then the whole of the property is exempt. Here housing facilities are reasonably necessary to the achievement of this particular type of religious activity and may be said to meet the test of being incidental to and reasonably necessary for religious purposes." [Emphasis added.]

The Requester argues that the Board's general policy expands Revenue and Tax Code section 214 beyond the judicial interpretation of the section. The Requester claims that

"The Board continuously misstates the holding of the Serra Retreat case by an adroit use of quotation marks. The Board states that 'the (Serra) court recognized that parish houses and rectories probably should be denied the exemption' (then the quote from Serra Retreat.[] [Handbook citation omitted.] In fact

Serra Retreat does not mention 'parish houses and rectories,' but 'parsonages.' This latter type of residence evokes a totally distinct type of lodging, line of cases, and tax characterization."²² [Emphasis added.]

This argument will be addressed under "Part II" of the determination. Summarizing, the Requester states that this general policy is a "regulation" as defined in Government Code section 11342(b), is subject to the APA, and is therefore in violation of Government Code section 11347.5.

On February 2, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,²³ along with a notice inviting public comment.

On March 19, 1990, OAL received the Board's Response to the Request for Determination. The Board argues that the contents of the Assessors' Handbook "merely instruct county assessors in assessment matters," and that the Assessors' Handbook is "an exercise of the Board's statutorily mandated power and duty to prepare and issue instructions to assessors designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation" ²⁴ The Board further argues that the challenged rule contained in the Handbook is not a "regulation" because the Legislature and California courts have recognized that the contents of the Handbook and other types of instructions to county assessors are merely advisory and do not have legally binding effect.

II. ISSUES

There are three main issues before us:²⁵

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."²⁶ Since the Board is in neither the judicial nor legislative branch

of state government, we conclude that APA rulemaking requirements generally apply to the Board.²⁷

We are aware of no specific statutory exemption which would permit the Board to conduct rulemaking without complying with the APA.²⁸

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

The challenged Board policy is set forth in the Assessors' Handbook (December 1985), AH 267, titled "Welfare Exemption," on pages 32 through 33, and is quoted above under the subheading "Background: This Determination."

In its Response, the Board argues that the challenged rule is contained in the Assessors' Handbook which "merely instruct[s] county assessors in assessment matters," and therefore is not a "regulation." In support of its argument, the Board cites Prudential Insurance Company v. City and County of San Francisco,²⁹ which, concerning other provisions contained in two other Assessors' Handbooks,³⁰ stated that "the handbooks do not contain the regulations, nor do they possess the force of law. They represent 'merely the opinions of the State Board staff, and [have] no binding legal effect on boards, assessors, or taxpayers.' [Citation.]"³¹

We agree with the Board that the Assessors' Handbook and its contents at issue here are not legally binding; however, whether a state agency rule constitutes a "regulation" hinges upon its effect and impact on the public,³² not on the agency's characterization of the rule. The Handbook explains its purpose as

"The purpose of this handbook is to present specific criteria which are to be used to distinguish from all of those organizations which apply for the exemption, those that are religious and charitable within the intent of the electorate when the [constitutional] amendment was adopted, and similarly to identify religious and charitable uses anticipated by the electorate."³³

Government Code section 11347.5, subdivision (a), prohibits the issuance or enforcement of "any guideline, criterion, . . . instruction, . . . [or] standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342 . . ." (Emphasis added.) Even though the challenged rule may be nonbinding, the use of the Handbook's "criterion" in determining whether a portion of religious property used for residential purposes is entitled to the welfare exemption can have a significant

effect and impact on the public. A taxpayer who wishes to challenge the granting or denial of the exemption would have to endure the "petition for hearing" appeal process.³⁴ A criterion or rule having such a significant effect or impact on the public, which has not been adopted pursuant to the requirements of the APA, is just what the APA was intended to prohibit.

We therefore reject the Board's argument, as we did in a prior determination concerning the Board,³⁵ that the challenged policy contained in the Assessors' Handbook is not a "regulation" because it has no legally binding effect.

We now examine the issue of whether the challenged policy is a "regulation" within the meaning of the key provision of Government Code section 11342, and is therefore subject to APA requirements. We note the general rule that if there is "any doubt as to the applicability of the APA's requirements [it] should be resolved in favor of the APA."³⁶

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in the key provision Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule of the state agency either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

A. Is the Board's Policy a Rule or Standard of General Application or a Modification or Supplement to Such a Rule?

The answer to the first part of the inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³⁷ The challenged rule is contained in the Assessors' Handbook, which is issued and distributed by the Board statewide for all assessors to use when assessing property, including the assessment of religious property used for residential purposes. There is no doubt that the rule is a standard of general application.

B. Does the Board's Policy Implement, Interpret, or Make Specific the Law Enforced or Administered by the Board or Govern Its Procedures?

For purposes of this analysis, we find that the challenged policy actually consists of three components or rules:

Rule No. 1: Residences of ministers, priests, and rabbis are not entitled to the welfare exemption because they are not used exclusively for religious purposes, unless

Rule No. 2: The residential use of the religious property presents the same factual situation as that found in the Serra Retreat case, i.e., retreat house, or other judicially-declared situations, or

Rule No. 3: The residential property is occupied by people devoted to a monastic lifestyle, i.e., monastery or convent.

In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and "its application." Such an

action by the agency is nonregulatory and is simply "administrative" in nature. If, however, the agency makes new law, i.e., supplements or further interprets a statute or provision of law, such activity is deemed to be an exercise of quasi-legislative power.

In this proceeding, the relevant statute is Revenue and Taxation Code section 214, subdivisions (a) and (i), which state in part:

"(a) Property used exclusively for religious . . . or charitable purposes . . . is exempt from taxation

". . . .

"(i) Property used exclusively for housing and related facilities for employees of religious . . . organizations which meet all the requirements of subdivision (a) and owned and operated by funds, foundations, or corporations which meet all the requirements of subdivision (a) shall be deemed to be within the exemption provided for in subdivision (b) of Sections 4 and 5 of Article XIII of the California Constitution and this section [214] to the extent the residential use of the property is institutionally necessary for the operation of the organization." [Emphasis added.]

The Requester alleges that "The Board has taken upon itself an extended, and in [the Requester's] view, erroneous interpretation of those cases in [the Assessors' Handbook] promulgated, without the benefit of public hearings in compliance with the APA, to all county assessors."³⁸ In particular, the Requester objects to the Board's use of the words "parish houses and rectories" in the Handbook, as being interchangeable with the word "parsonage," as used by the Court in the Serra Retreat case. The Requester argues "In fact Serra Retreat does not mention 'parish houses and rectories,' but 'parsonages.' This latter type of residence evokes a totally distinct type of lodging, line of cases, and tax characterization."³⁹

We disagree with the Requester that the use of the words "parish houses and rectories" by the Board in the Handbook as being interchangeable with the word "parsonages" as used by the Serra Retreat Court is an extended and erroneous interpretation of the case. We find the Board's use of "parish houses and rectories" appropriate in light of the Serra Retreat Court's discussion.⁴⁰

However, while we disagree with the Requester's rationale for concluding that the challenged policy is a "regulation," we do agree, for reasons stated below, that the challenged

policy further supplements or interprets section 214, subdivisions (a) and (i), and therefore meets the definition of "regulation."

REASON NO. 1:

The Handbook states:

"At the same time, the [Serra Retreat] court recognized that parish houses and rectories probably should be denied the exemption 'where the provision of housing for the pastor or minister on church property does not stem from claims of institutional necessity as contrasted with mere considerations of residential convenience. [Footnote omitted.] [Par.] . . . [C]onventional residences of ministers, priests, and rabbis have never been exempted because they are used for their private residential purposes and not religious purposes exclusively." [Emphasis added.]

It is this quoted dictum language of the Serra Retreat opinion in the Handbook that the Board seems to rely upon as the basis for Rule No. 1 of its policy, i.e., residences of clergy are not exempt because they are by Board definition used for their private residential purposes and not religious purposes exclusively. This reliance is evident in the Board Hearing Summary and the Staff Analysis attached to the Request for Determination.

These two attachments concern an appeal by the Catholic Foreign Mission Society of America in which portions of the Society's property used to house priests who work in the Maryknoll Order were found ineligible for the welfare exemption. These portions were used both for private residential purposes and religious purposes.⁴¹ The appeal was denied by the Board.⁴²

On page 2 of the Board Hearing Summary, the Board repeats verbatim the challenged Handbook language, then adds a longer quotation from the Serra Retreat case which includes the same language quoted in the Handbook. The Board then states:

"With these and certain other exceptions not applicable hereto, administratively, the Board has taken the position in its Assessors' Handbook AH 267, Welfare Exemption, at page 33 that housing owned by a church and occupied by ministers, priests or rabbis is not exempt because it is used for their private residential purposes and not religious purposes exclusively." [Emphasis added.]

The Board further states on page 3 of the Hearing Summary:

"Staff's Position: Consistent with Serra Retreat v. Los Angeles County, supra, and Assessors' Handbook AH 267, Welfare Exemption, the portions of the Claimant's property used to house these priests are used both for private residential purposes and religious purposes. The providing of living quarters to these priests is for the convenience of the claimant and the priests, not institutionally necessary and not incidental to or reasonably necessary for religious purposes, as those terms have been construed by the courts and by the Board." [Emphasis added.]

The language from the Board's Hearing Summary, quoted above, is almost verbatim the language found on pages 2-3 of the Staff Analysis attachment. Additionally, the Staff Analysis states on page 2:

"With respect to the eligibility of housing for the exemption under the religious purposes aspect of the exemption, instances in which property used for residential purposes has been found eligible are limited. For the most part, the provision of housing for officers, employees, etc. of religious organizations, like other organizations, stems from considerations of residential convenience rather than from claims of institutional necessity. Thus, that property found eligible under the religious purposes aspect of the exemption has been confined to property:

A. Used to provide housing for retreatants and for priests, lay brothers, caretakers, etc. conducting and/or supporting a religious retreat (Serra Retreat v. Los Angeles County [citation]; and Saint Germain Foundation v. Siskiyou County⁴³ [citation]).

B. Used to provide temporary low-cost housing for missionaries and their families while the missionaries were on furlough or retirement (House of Rest v. Los Angeles County⁴⁴ [citation]).

C. Used to provide housing for young men and boys in the course of carrying on a program as a religious and charitable institution whose purpose is to promote the welfare of same (Young Men's Christian Association v. Los Angeles County⁴⁵ [citation]).

". . . .

"With these and certain other exceptions not applicable hereto, administratively, the Board has taken the position in its Assessors' Handbook AH 267, Welfare Exemption, at page 33 that housing owned by a church

and occupied by ministers, priests or rabbis is not exempt because it is used for their private residential purposes and not religious purposes exclusively. . . ." [Emphasis added.]

And, on page 4 of the Staff Analysis:

"Thus, at issue is whether portions of the Society's property used to house priests who minister to several Dioceses, design mission education programs, communicate and recruit for religious work, raise funds, and foster vocations and counsel young people interested in pursuing a vocation through the Maryknoll Order are used exclusively for religious purposes or both for private residential purposes and religious purposes." [Emphasis added.]

These two attachments and the challenged portion of the Handbook clearly show that the Board has developed a narrower interpretation of the section 214 language ("Property used exclusively for religious purposes") than had the Serra Retreat Court. This narrow interpretation by the Board is reflected in the three rules of the challenged policy, i.e., (No. 1) residential property is not exempt because it is not used exclusively for religious purposes, unless (No. 2) it is the same factual situation as presented in the Serra Retreat case (retreat house) or other judicially-declared factual situation, or (No. 3) occupied by people devoted to a monastic lifestyle.

The Serra Retreat Court found that "there must be a strict but reasonable construction of [the welfare exemption] law."⁶ With this in mind, the Court held that property used exclusively for religious purposes includes "any property of the religious . . . entity which is used exclusively for any facility which is incidental to and reasonably necessary for the accomplishment of religious . . . purposes." (Emphasis added.) This is a broader interpretation of section 214 than the Board's interpretation set forth in the challenged policy.

REASON NO. 2:

The above noted attachments and the Handbook are also evidence of the fact that the challenged policy is the Board's rule, not merely instructions to local assessors. As further support of this finding, we note the Board's statement in its Informative Digest concerning the proposed regulatory action of adding section 137 to Title 18 of the CCR. The Informative Digest states:

"This rule is being added to interpret statutes pertaining to the exemption of property owned by religious organizations and used by them to house

ministers, priests and rabbis. For some time the staff of the Board has considered housing occupied by religious [clergy] to be eligible for exemption only when it is occupied by people devoted to a monastic lifestyle or when it could be shown that the residential property was needed to house people who were essential to the operation of the main property." [Emphasis added.]

This "monastic lifestyle" exception to the Board's policy (Rule No. 3) is set forth in the challenged portion of the Handbook:

"On the other hand, if the practitioners of a religion seek to follow it in a contemplative manner and in order to do so live withdrawn from the world within the confines of a monastery or convent in a full-time commitment [sic] of their lives to religious practices then the whole of the property is exempt." [Emphasis added.]

Neither the Board nor the Handbook cites any legal authority, statutory or case law, which would support this interpretation of section 214. We conclude therefore that this Rule No. 3 "exception" further interprets Revenue and Taxation Code section 214.

REASON NO. 3:

Additionally, and more importantly in light of the 1950 date of the Serra Court decision and the 1988 addition of subdivision (i) to section 214, we conclude that all three rules of the challenged policy further supplement and interpret section 214, subdivision (i).

Section 214, subdivision (i) provides:

"(i) Property used exclusively for housing and related facilities for employees of religious, charitable, scientific, or hospital organizations which meet all the requirements of subdivision (a) and owned and operated by funds, foundations, or corporations which meet all the requirements of subdivision (a) shall be deemed to be within the exemption provided for in subdivision (b) of Sections 4 and 5 of Article XIII of the California Constitution and this section [214] to the extent the residential use of the property is institutionally necessary for the operation of the organization." [Emphasis added.]⁴⁷

The Board did not indicate in its Response that (1) the challenged rule in the Handbook was no longer being used by it or local assessors when assessing religious property used for residential purposes; or (2) that this portion of the

Handbook had been updated or rescinded by a letter to assessors or that revised Handbook pages had been distributed.

We therefore conclude the challenged Board policy implements, interprets or makes specific section 214, subdivisions (a) and (i), and thus violates Government Code section 11347.5, subdivision (a).

Additional evidence of the policy's regulatory nature is the fact that in 1987 the Board began the formal rulemaking process, in accordance with APA procedures, by having published in the California Regulatory Notice Register the notice of proposed regulatory action adding section 137 to Title 18 of the CCR.⁴⁸ In its Response to this Request for Determination, the Board explained

"in 1987 the Board initiated and considered a proposed regulation concerning property tax exemption for residential use of religious property, as [the Requester] noted. After carefully considering the testimony presented at several public hearings on the proposed regulation, the Board has taken no further action to adopt a rule in this area which would be legally binding on county assessors."⁴⁹

By this action, the Board impliedly acknowledged the regulatory nature of the challenged rule.

WE THEREFORE CONCLUDE that the challenged policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b), and thus is subject to the requirements of the APA.

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.


Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.⁵⁰ Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.⁵¹ However, none of the recognized general exceptions (set out in note 51) apply to the challenged rule.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) the challenged policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) the policy is not exempt from the requirements of the APA; and therefore,
- (4) the policy violates Government Code section 11347.5, subdivision (a).

DATE: May 23, 1990


HERBERT F. BOLZ
Coordinating Attorney


DEBRA M. CORNEZ
Staff Counsel

Rulemaking and Regulatory
Determinations Unit⁵²
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, ATSS 8-473-6225
Telecopier No. (916) 323-6826

1. This Request for Determination was filed, on behalf of the California Catholic Conference, by Raymond J. Leonardini, Esq., 1029 J Street, Suite 400, Sacramento, CA 95814, (916) 444-3200. The Board of Equalization was represented by Cindy Rambo, Executive Director, 1020 N Street, Sacramento, CA 95814, (916) 445-3956.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "232" rather than "1." About two weeks after a determination is filed with the Secretary of State, it is published in the Notice Register. Different page numbers are necessarily assigned when the determination is published in the Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

(1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449 (the Second District Court of Appeal--citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved)--refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

(3) California Coastal Commission v. Office of Administrative Law (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560 (relying on a footnote in a 1980 California Supreme Court opinion, First District Court of Appeal, Division One, set aside 1986 OAL Determination No. 2 (California Coastal Commission, Docket No. 85-003) on grounds that challenged coastal development guidelines fell within scope of express statutory exception to APA requirements); review denied by California Supreme Court on August 31, 1989, two justices dissenting.

(4) Grier v. Kizer (April 1990) __ Cal.App.3d __, 268 Cal.Rptr. 244 (ord. mod. opn. May 2, 1990; app. pending)2. (giving "due deference" to 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016), the Second District Court of Appeal, Division Three, held that the statistical extrapolation rule used in Medi-Cal provider audits was an invalid and unenforceable underground regulation).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"Determination" means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable

unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) ___ Cal.Rptr. ___, 268 Cal.Rptr. 244, (ord. mod. opn. May 2, 1990; app. pending). Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" ___ Cal.App.3d ___, 268 Cal.Rptr. at 251.

In regard to the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]" [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as

defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were submitted in this proceeding.

The Board of Equalization's Response to the Request for Determination was received by OAL on March 19, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the

Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['']regulation[''] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

11. Article XIII, section 1 1/2 provided: "All buildings . . . used solely and exclusively for religious worship . . . shall be free from taxation"
12. Assembly Constitutional Amendment No. 32 of the 1973-74 Regular Session of the Legislature (Stats. 1974, Res. c. 77) was approved by the voters in the general election held on November 5, 1974, thereby amending several provisions of the Constitution.
13. Article XIII of the California Constitution, section 1c stated:

"In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes and owned by community chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes, not

conducted for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

14. Statutes 1945, chapter 241, page 706, section 1.
15. Holbrook, Jr., Maxwell, and Rourke, Fifield Manor Tax Refund Cases: True Meaning of "Charity" Under California Welfare Tax Exemption Restated (1962) 35 So.Cal.L.Rev. 276, 281.
16. Id., p. 282.
17. (1950) 35 Cal.2d 755.
18. Id., at 758.
19. Id., at 759.
20. Statutes 1988, chapter 1591, page 4512.
21. Article XIII, section 5 of the Constitution states:
"Exemptions granted or authorized by Sections 3(e), 3(f), and 4(b) apply to buildings under construction, land required for their convenient use, and equipment in them if the intended use would qualify the property for exemption."
22. See Request for Determination, p. 3, n. 5.
23. California Regulatory Notice Register 90, No. 5-Z, February 2, 1990, p. 180.
24. Board's Response, p. 2.
25. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

26. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
27. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
28. In its Response to the Request, the Board does not question the general applicability of the APA to the Board's Property Tax rulemaking activities. In fact, the Board acknowledges its rulemaking attempt to codify a proposed regulation concerning a property tax exemption for residential use of religious property. The Board states on page 4 of its Response, "After carefully considering the testimony presented at several public hearings on the proposed regulation, the Board has taken no further action to adopt a rule in this area"
29. (1987) 191 Cal.App.3d 1142, 236 Cal.Rptr. 869.
30. The issue in the case was the proper determination of a property's fair market value for tax assessment purposes. The two Assessors' Handbooks referred to in the case are entitled "General Appraisal Manual" and "Cash Equivalent Analysis."
31. Id., 191 Cal.App.3d at 1155, 236 Cal.Rptr. at 877.
32. Winzler & Kelly v. Department of Industrial Relations, supra, note 25.
33. Assessors' Handbook, "Welfare Exemption," AH 267, December 1985, p. 1.

34. See Revenue and Taxation Code section 254.5 and Title 18, CCR, section 136 ("Welfare Exemption Claim Review Procedure").
35. See 1990 OAL Determination No. 7 (Board of Equalization, March 23, 1990, Docket No. 89-013), California Regulatory Notice Register 90, No. 14-Z, April 6, 1990, pp. 542, 549-550, typewritten version, pp. 186-189. In two other determinations, OAL also rejected the Board's argument that letters to assessors are not "regulations" because they are not legally binding: (1) 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-18--B-34, and (2) 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-7--B-26.
36. Grier v. Kizer (1990) __ Cal.App.3d __, 268 Cal.Rptr. 244, 253; Order Modifying Opinion, May 2, 1990.
37. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
38. The cases referred to by the Requester, in addition to Serra Retreat, are Cedars of Lebanon Hospital v. County of Los Angeles (1950) 35 Cal.2d 729, House of Rest of Presbyterian Church v. County of Los Angeles (1957) 151 Cal.App.2d 523, and Young Men's Christian Association v. County of Los Angeles (1950) 35 Cal.2d 760. The court in each of these cases found that the portion of the religious or charitable property that was used for residential purposes was incidental to and reasonably necessary for the accomplishment of the exempt purpose. See Request for Determination, p. 2.
39. Request for Determination, p. 3, n. 5.
40. We disagree with the Requester's argument for the following reasons.

The Serra Retreat Court's language to be examined here is as follows:

" . . . [T]he conclusion is inescapable that the portion of plaintiff's building used to furnish housing accommodations for the essential retreat personnel is properly classifiable as property 'used exclusively for

religious purposes.' As so viewed, plaintiff's provision of living quarters for its needed retreat personnel as an institutional necessity--a facility incidental to and reasonably necessary for the accomplishment of its religious and charitable purposes--is wholly distinguishable from the parsonage cases where the provision of housing for the pastor or minister on church property does not stem from claims of institutional necessity as contrasted with mere considerations of residential convenience." [35 Cal.2d at 759.] [Emphasis added.]

We note that the Serra Retreat Court addressed the county's argument that, as support for its denial of the exemption on the residential portion of the retreat's property, the county

"calls attention to the fact that while there is some conflict of opinion, the weight of authority sustains the rule that a parsonage or rectory owned by a church society or religious body, and occupied as a residence by the pastor or corresponding church dignitary, is not exempt as property 'used for religious purposes.' (Anno: 13 [American Law Reports] 1196; 168 [American Law Reports] 1247.)" [Id., at 758.] [Emphasis added.]

We assume that the Court read the cases annotated in the cited American Law Reports because the Court then states:

"The cases generally fall into these main categories: (1) those considering a differing law in that the exemption of church property was confined to 'places of religious worship' or to 'houses of public worship'; (2) those involving an express statutory limitation as to amount of exemption for parsonages and buildings of that character, which direct provision precluded consideration of the additional ground that they constituted property 'used for religious purposes'; or (3) those where the determination rested upon an analysis of the particular facts affecting the exemption of the church property in question so as to show that the use of the property for the parsonage or similar building was not a use for a facility which was incidental to and reasonably necessary for the accomplishment of the religious purposes of the church." [Id., at 758-759.] [Emphasis added.]

In the introduction of the volume 13, American Law Reports (A.L.R.) annotation, cited two quotations above, it states:

"The term 'parish house' as used in this annotation includes only houses used as residences of pastors, ministers, rectors, and priests of churches; and this limitation necessarily excludes cases having to do with

buildings called 'parish houses,' but which are used exclusively for purposes purely incidental to the church proper, such, for instance, as Sunday-school rooms, chapels, reception rooms, and studies, or for social purposes, recreation, etc." [13 A.L.R. 1196.] [Emphasis added.]

The annotation further provides, under the heading "II. General rule":

"Although, as subsequently shown, there is some conflict, the decided weight of authority supports the rule that parsonages, residences of ministers, and parish houses owned by a church society or corporation, and occupied as a residence by the pastor, rector, or priest of a church, are not included within the more general exemption from taxation of houses, etc., used for religious purposes." [Id., at 1197.] [Emphasis added.]

We were unable to find one case in the numerous cases cited in the A.L.R. annotation that made a distinction, in granting or denying the exemption, as to whether the residential property was referred to as a parsonage, rectory or residence, or whether it was occupied by a pastor, priest, rabbi, minister, or rector. Instead, the answer to whether the exemption applied to such residences seemed to depend entirely upon the constitutional or statutory provisions conferring the tax exemption. We found that the term "parsonage" was used in a broad general sense to mean any ministerial residence owned by a religious institution and used as such.

We also note that the Serra Retreat Court weighed heavily the retreat's allegations or claims of institutional necessity:

"[T]he determinative factor here sustaining the propriety of the welfare tax exemption is the alleged institutional necessity for the provision of living quarters on the retreat property for the essential personnel. So significant are the allegations in the complaint that the 'presence on [plaintiff's] property of [the] priests and lay-brothers is essential, indispensable and necessary to the conduct and operation of [the] Serra Retreat,' and that their living on said property is 'essential and necessary' to the 'spiritual' and 'temporal needs,' respectively, of 'the laymen using the facilities of said institution.'" [35 Cal.2d at 759.] [Emphasis added.]

We therefore conclude that the Serra Retreat Court's statement regarding "parsonage cases" was not a matter of distinguishing "parsonage" from "rectory," but rather a

comparison between the claimed use of the religious property, i.e., providing the "living quarters for . . . needed retreat personnel as an institutional necessity" versus providing "housing for the pastor or minister . . . [which] does not stem from claims of institutional necessity as contrasted with mere considerations of residential convenience." (Emphasis added.) We therefore disagree with the Requester's argument that the challenged policy is an underground regulation because the Board uses the terms "parish houses and rectories" interchangeably with "parsonage." We do conclude, however, that the challenged policy is an underground regulation for other reasons, as set forth in the text of the Determination.

41. Board of Equalization Appeal No. WEC87-21, November 22, 1988.
42. Request for Determination, p. 2, n. 4.
43. (1963) 212 Cal.App.2d 911.
44. (1957) 151 Cal.App.2d 523.
45. (1950) 35 Cal.2d 760.
46. 35 Cal.2d at 758.
47. Article XIII, section 5 of the Constitution states:
"Exemptions granted or authorized by Sections 3(e), 3(f), and 4(b) apply to buildings under construction, land required for their convenient use, and equipment in them if the intended use would qualify the property for exemption."
48. California Regulatory Notice Register 87, No. 33-Z, August 14, 1987, p. 41. Proposed section 137 provided:
"Rule 137. WELFARE EXEMPTION - RESIDENTIAL PROPERTY.
"Where a religious organization meeting the criteria of Revenue and Taxation Code Section 207 or 214, and of either Revenue and Taxation Code Section 23701d or Internal Revenue Code Section 501(c)(3) owns property exempt under Revenue and Taxation Code Section 206, 207, or 214, and also owns property used principally in conjunction with the exempt property as a residence for the maintenance of a minister, priest, rabbi, or other

religious functionary who is regularly and generally present and whose presence is related to and reasonably necessary for the accomplishment of a religious purpose of the organization, and who devotes the majority of his or her time to the accomplishment of that purpose, and the use of the residence is to meet a need of the religious organization rather than solely for the convenience of the person or persons occupying the residence, then the residence shall be exempt." [Emphasis added.]

49. Board's Response, p. 4.

50. Government Code section 11346.

51. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- d. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- e. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167

Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation" -- rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either (1) not a "standard of general application" or (2) not "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation," or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. (See Grier v. Kizer (1990) ___ Cal.App.3d ___, 268 Cal.Rptr. 244, 251 (ord. mod. opn. May 2, 1990; app. pending) (quoting OAL's two-prong test analysis, impliedly accepting it as correct).

The above listing is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index

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of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

52. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.